MESSRS ALBERT DING, LEE & PARTNERS v. CHO CHOOI MEI

HIGH COURT MALAYA, JOHOR BAHRU
EVROL MARIETTE PETERS JC
[WRIT NO: JA-22NCvC-262-12-2018]
15 DECEMBER 2019

CONTRACT: *Agreement – Validity – Agreement for payment of legal fees between legal firm and client – Firm engaged by client to act in divorce matter – Agreement for payment of legal fees provided that firm to charge by deducting 6% from monthly instalments payable by client's former husband for 60 months – Whether firm could claim for legal fees under agreement – Whether there was element of coercion – Whether agreement contingency fee arrangement – Whether terms of agreement unreasonable – Whether client fully apprised of facts and had full knowledge of implications of what she signed – Whether client could set aside agreement – Whether agreement valid*

CONTRACT: *Agreement – Coercion – Agreement for payment of legal fees between legal firm and client – Firm engaged by client to act in divorce matter – Agreement for payment of legal fees provided that firm to charge by deducting 6% from monthly instalments payable by client's former husband for 60 months – Allegation that client coerced into signing agreement – Lawyer allegedly threatened not to release sum payable by client's former husband to client if client refused to sign agreement – Whether there was element of coercion – Whether client voluntarily entered into agreement – Whether client coerced and pressured into entering agreement – Whether agreement valid – Whether firm entitled to legal fees under agreement – Whether client could set aside agreement – Contracts Act 1950, ss. 15, 19 & 24*

CONTRACT: *Contingency contract – Agreement for payment of legal fees – Contingency fee arrangement – Firm engaged by client to act in divorce matter – Agreement for payment of legal fees provided that firm to charge by deducting 6% from monthly instalments payable by client's former husband for 60 months – Whether agreement contingency fee arrangement – Whether allowed – Contracts Act 1950, s. 24*

LEGAL PROFESSION: *Duty to client – Breach – Legal firm and client entered into agreement for payment of legal fees – Agreement drafted in English language – Client not proficient in English language – Whether terms of agreement explained to client in her mother tongue – Whether client had separate legal advice – Whether client fully apprised of facts and had full knowledge of implications of what she signed – Whether advocate and solicitor communicated terms of agreement clearly and effectively to client – Whether client entered into agreement voluntarily – Whether there was breach of fiduciary duty*

A ***LEGAL PROFESSION:*** *Solicitor/client – Legal fees – Legal firm and client entered into agreement for payment of legal fees – Firm engaged by client to act in divorce matter – Agreement for payment of legal fees provided that firm to charge by deducting 6% from monthly instalments payable by client's former husband for 60 months – Whether agreement contingency fee arrangement – Whether allowed* B *– Legal Profession Act 1976, ss. 112 & 118(3)*

EVIDENCE: *Adverse inference – Failure to call material witness – Legal firm and client entered into agreement for payment of legal fees – Firm engaged by client to act in divorce matter – Agreement for payment of legal fees provided that firm to charge by deducting 6% from monthly instalments payable by client's former* C *husband for 60 months – Allegation that client coerced into signing agreement – Lawyer allegedly threatened not to release sum payable by client's former husband if client refused to sign agreement – Lawyer not called to testify – Whether lawyer material witness – Whether failure to call lawyer to testify detrimental to case – Whether adverse inference ought to be invoked for failure to call lawyer – Evidence* D *Act 1950, s. 114(g)*

The defendant had sought legal advice from the plaintiff, a legal firm, regarding the divorce from her former husband. Although the defendant signed a warrant to act ('first agreement'), there was no agreement on the legal fees. The divorce was finalised through a *decree nisi* order ('order') by E way of consent where the defendant was to receive RM1.1m from her former husband with RM200,000 to be paid immediately and the balance of RM900,000 to be paid by instalments over 60 months. The plaintiff charged the defendant a total of RM25,000 being legal fees for works done up to the filing of the order. The defendant then entered into an agreement with the F managing partner of the plaintiff ('SP1') for legal fees ('second agreement'). The second agreement provided that (i) the plaintiff was to charge by way of deducting 6% from the monthly instalments of RM15,000 payable by the defendant's former husband, for a period of 60 months, commencing May 2018; and (ii) the plaintiff agreed to ensure that her former husband would adhere to the terms of the order and to act for the defendant in case of any G default/refusal in payment by her former husband. The defendant paid (i) RM15,000 to the plaintiff as part of the legal fees and disbursements in respect of the first agreement; and (ii) RM1,800 pursuant to monthly fees in respect of the second agreement. However, upon the instruction of the defendant, another legal firm, Messrs Vooi & Yee, informed the plaintiff that H (i) they would take over the matter from the plaintiff and requested for the final tax invoice for legal services provided by the plaintiff in the divorce matter; and (ii) the second defendant wished to terminate the second agreement. The defendant sent a cheque to the plaintiff in the amount of RM10,000 as full and final settlement of the matter, which was accepted by

I

the plaintiff under protest. The plaintiff commenced the present claim for, *inter alia*, (i) a declaration that the first and second agreements were valid, reasonable and enforceable pursuant to ss. 116 and 118 of the Legal Profession Act 1976 ('LPA'); (ii) the plaintiff be permitted to cash the cheque in the amount of RM10,000, issued by Messrs Vooi & Yee, to settle the balance sum owing by the defendant and if the cheque had lapsed that Messrs Vooi & Yee immediately issues a new and valid cheque for the same amount; (iii) the balance of the legal fees and disbursements due from the defendant in the amount of RM62,200 pursuant to both agreements and goods and services tax ('GST') to be imposed on such amount due; and (iv) general or exemplary damages. Refuting the plaintiff's claim, the defendant submitted that (i) the plaintiff was not entitled to the fees claimed under the first agreement as the order was obtained due to the efforts of a friend ('SD2') of both the defendant and her former husband and not attributable to the plaintiff; and (ii) she was coerced into signing the second agreement by a lawyer from the plaintiff's firm ('Gunavati') who threatened not to release the cheque of RM200,000, being the sum immediately payable under the order, if the defendant refused to do so. The plaintiff argued that (i) pursuant to s. 103 of the Evidence Act 1950 ('EA'), it was for the defendant to prove that the second agreement was signed involuntarily and with coercion and pressure; (ii) it was for the defendant to prove the circumstances in which the second agreement was entered into; (iii) despite the defendant's allegations, she had never carried out any action under the LPA for the purpose of taxation of the plaintiff's tax invoice; and (iv) based on r. 54(a) of the Legal Profession (Practice & Etiquette) Rules 1978 ('LPPER'), 'no other advocate and solicitor shall knowingly agree to appear or to act or continue to appear or to act for such party in such matter or proceeding unless he obtains the consent of the first-named advocate and solicitor'. The issues that arose for adjudication were: (i) whether the first and second agreements were valid; (ii) whether the defendant was coerced into entering the second agreement; (iii) whether adverse inference, under s. 114(g) of the EA, ought to be invoked against plaintiff for failing to produce Gunavati; (iv) whether the second agreement was a contingency fee arrangement; (v) whether the terms of the second agreement were unreasonable; (vi) whether the defendant was entitled to terminate the second agreement; and (v) whether the defendant was entitled to change solicitors.

Held (allowing claim regarding first agreement but dismissing claim regarding second agreement):

(1) SD2 was not aware of the order since he was not able to read. If SD2 could not even understand the order, it could not have been possible for him to have drafted the order which contained 15 paragraphs of legalese. It was undeniable that drafting those paragraphs would require specific legal knowledge, belonging only to a legal practitioner. (paras 19 & 20)

(2) The defendant did not really challenge the first agreement, as she had agreed to the fees of RM25,000 and even paid RM15,000 as part payment. She had also forwarded a cheque for RM10,000 to the plaintiff, to settle the balance payment of the legal fees owing. Therefore, the defendant had no basis to dispute the first agreement. (para 21)

(3) Any additional amount, in the form of GST added to the RM25,000, was an afterthought, as the total fees stipulated in the invoice was RM25,000, and nothing more. The first agreement was upheld only to the extent of the amount of RM25,000. (paras 22 & 23)

(4) The relationship between a legal practitioner and his/her client imports a duty to be honest in all dealings and to be diligent in the advice and information given to such client. The plaintiff, being a firm of advocates and solicitors, had a fiduciary duty towards the defendant and, as a result, the duty was upon the plaintiff to communicate clearly and effectively with the defendant. In fact, as common practice and courtesy would dictate, an advocate and solicitor should have briefed the defendant in a proper manner pertaining to any further instructions and the fees attached. (para 30)

(5) By virtue of s. 111 of the EA, the duty was imposed on the plaintiff to prove that the second agreement was entered into by the defendant voluntarily and with full knowledge of the implications of what she had signed. Section 111 of the EA is triggered when one party stands to the other in a position of active confidence. Active confidence exists when there is a relationship of trust and confidence between the parties of such nature that it is fair to presume that the wrongdoer abused the relationship in procuring the complainant to enter into the impugned transaction. In such a case, the complainant need not produce evidence that actual undue influence was exerted in relation to the particular transaction. Once a confidential relationship has been proved between the plaintiff and the defendant, the burden then shifts to the plaintiff to prove that the defendant had entered into the impugned transaction freely. In this case, there was no doubt that the plaintiff stood in a position of trust and confidence to the defendant, the latter being its client at the material time. (paras 34-38)

(6) The second agreement was drafted in English and the defendant was not proficient at all in the English language. She was conversant only in basic Bahasa Malaysia. When the second agreement was executed, the defendant had no separate legal advice. There was no certification of any sort that it had been explained to the defendant in her mother

tongue. It was the plaintiff's duty to prove that the defendant, being its client, had entered into the second agreement fully apprised of the facts and had signed the second agreement voluntarily, with full knowledge of the implications of what she had signed, especially since the defendant was not familiar with the intricacies of the law and its mechanism. It was the plaintiff's implied duty to ensure that this had been done, and in failing to do so, the plaintiff had failed in its duty as advocates and solicitors. (paras 31 & 40)

(7) The defendant had discharged the legal burden imposed on her to prove that she signed the second agreement under coercion. She was earnest in her explanation and did not strike as someone whose evidence had to be viewed with circumspection. Being a lay person and desperate for the money that she was entitled to post-divorce, there was no reason to disbelieve her. Her evidence was intact. Although she had many questions repeated so that she could understand them, she answered them truthfully. The discrepancies in her evidence were minor and she was convincing in her evidence. On the other hand, the plaintiff's witness, SP1, was defensive and evasive. He was evasive to several questions, especially those relating to the nature of the services that he provided pursuant to the second agreement, prompting the court several times to instruct him to answer the questions accordingly. He also displayed hostile behaviour towards counsel for the defendant. (paras 42, 97, 99, 100 & 102)

(8) The only evidence adduced by the plaintiff to contradict the defendant's evidence that she signed it under pressure was the evidence of SP1 whose evidence did not carry any weight whatsoever as he was not present at the material time to fully appreciate the circumstances in which the second agreement was signed. It was, therefore, for the plaintiff to produce its witness, Gunavati, to dispute the defendant's evidence that she signed the second agreement under pressure. This, the plaintiff had not done. When asked as to why Gunavati was not produced, SP1's answer was a nonchalant 'it is not necessary'. SP1's unsatisfactory answer led to the inference that Gunavati was deliberately withheld and, in such circumstances, an adverse inference under s. 114(g) of the EA was drawn against the plaintiff for failing to call Gunavati. Taking all the evidence, including the evidence of the defendant and the failure of explanation by SP1, Gunavati had unlawfully detained the defendant's property, the cheque, unless she signed the second agreement, which rendered the full force of s. 15 of the Contracts Act 1950 ('CA'). (paras 44-46 & 51-52)

(9) Since the second agreement was obtained by coercion pursuant to s. 15 of the CA, s. 19 of the CA was triggered. By virtue of s. 19(1) of the CA, a contract entered into by a party either through innocent or fraudulent misrepresentation was voidable at the option of the party whose consent was so obtained. Thus, the innocent party who had been induced to enter into the contract through an innocent misrepresentation, may choose to set aside the contract on his own accord or by seeking the assistance of the court. As a result of the coercion, the defendant was at liberty to set aside the contract on her own accord and, in this case, she had done so. A void agreement is one that does not even exist to begin with. Therefore, the issue of whether the defendant was entitled to terminate it did not even arise. There was no obligation on the defendant to apply for taxation of the plaintiff's tax invoices. (paras 69, 70, 71, 72 & 74)

(10) The second agreement was, in actual fact, a contingency fee arrangement. There is no dearth of literature which provides for the justification against such arrangement of payment. By virtue of s. 112 of the LPA, the second agreement was void, against public policy and the professional ethics of the lawyer. The plaintiff had misused its position of trust in indulging in a contingency fees contract. The nature of the second agreement also attracted s. 24 of the CA. Furthermore, pursuant to s. 118(3) of the LPA, the second agreement was void on the basis of its unfair and unreasonable terms because the services rendered were vague and uncertain. SP1 failed to explain what exactly the services entailed, bearing in mind that the monthly instalment of RM15,000 was paid directly to the defendant by her former husband. The services of supervising and updating were redundant and superfluous. (paras 54-57, 60 & 68)

(11) Rule 54(a) of the LPPER provides that 'no other advocate and solicitor shall knowingly agree to appear or to act or continue to appear or to act for such party in such matter or proceeding unless he obtains the consent of the first-named advocate and solicitor'. However, the same r. 54 also provided, in para. (b) that 'no other advocate and solicitor shall knowingly agree to appear or to act or continue to appear or to act for such party in such matter or proceeding unless he is satisfied that the proper professional remuneration of the first-named advocate and solicitor has been paid or he undertakes that the same will be paid. It was undisputed that counsel for the defendant had issued a cheque to the plaintiff which the plaintiff had accepted under protest on the basis that it was not the full and final settlement of the fees. (paras 77 & 78)

(12) Section 94(m) of the LPA was relevant to the present case. Although the second agreement was made in writing, it was void. There was no agreement to begin with. Hence, the application of s. 94(m) of the LPA, which refers to excessive fees charged in the absence of a written contract. (para 83)

(13) The plaintiff's claim was allowed only with regard to the enforceability of the first agreement. The defendant was ordered to re-issue the cheque to the plaintiff for the balance sum of RM10,000. With regards to the second agreement, the plaintiff's claim was dismissed with costs. (para 103)

Case(s) referred to:

Adel Muhd El-Dabbah v. AG of Palestine [1944] AC 156 ***(refd)***
Balakrishnan Devaraj & Anor v. Admiral Cove Development Sdn Bhd [2010] 7 CLJ 152 CA ***(refd)***
Bank of Credit and Commerce International SA v. Aboody [1990] QB 923 ***(refd)***
Barclays Bank plc v. O'Brien [1994] 1 AC 180 ***(refd)***
Bombay Cotton Manufacturing Company v. Motilal Shivlal ILR 1915 39 Bom 386 ***(refd)***
Boonsoom Boonyanit v. Adorna Properties Sdn Bhd [1997] 3 CLJ 17 CA ***(refd)***
Kwang Boon Keong Peter v. PP [1998] 2 SLR 211 ***(refd)***
Lin Wen-Chih & Anor v. Mycom Bhd [2013] 1 LNS 1231 CA ***(refd)***
McAllister v. Campbell [2014] NIQB 24 ***(refd)***
Molly Margrete Andrew Gomez v. Tan Suat Ching; Majlis Peguam Malaysia (Intervener) [2014] 8 CLJ 536 HC ***(refd)***
Munusamy Vengadasalam v. PP [1987] 1 CLJ 250; [1987] CLJ (Rep) 221 SC ***(refd)***
Murugan v. Lew Chu Cheong [1980] 1 LNS 49 FC ***(refd)***
Rosli Darus v. Mansor Hj Saad & Anor [2001] 4 CLJ 226 HC ***(refd)***
Saad Marwi v. Chan Hwan Hua & Anor [2001] 3 CLJ 98 CA ***(refd)***
Sean Thornton v. Northern Ireland Housing Executive [2010] NIQB 4 ***(refd)***
Southern Bank Bhd v. Abdul Raof Rakinan & Anor [2001] 1 CLJ 94 HC ***(refd)***
S P Veloo & Co v. Affin Bank Bhd [2017] 1 LNS 1041 CA ***(refd)***
Titian Desa Sdn Bhd & Anor v. Akberdin Haji Abdul Kader [2016] 1 LNS 689 CA ***(refd)***

Legislation referred to:

Contracts Act 1950, ss. 15, 19(1), 24
Evidence Act 1950, ss. 103, 111, 114(g), 146
Legal Profession Act 1976, ss. 94(m), 112, 116, 118(3), 120
Legal Profession (Practice and Etiquette) Rules 1978, rr. 16, 35, 54(a), (b)
Rules of Court 2012, O. 64

For the plaintiff - Ronnie Tang Pei Xin; M/s Albert Ding, Lee & Partners
For the defendant - CW Yee; M/s Vooi & Yee

Reported by Najib Tamby

A

JUDGMENT

Evrol Mariette Peters JC:

The Claim

[1] The plaintiff's claim is for, *inter alia*, the following:

B

(i) a declaration that the two agreements between the plaintiff and defendant are valid, reasonable, and enforceable pursuant to ss. 116 and 118 of the Legal Profession Act 1976 ("the LPA");

(ii) that the plaintiff be permitted to cash the cheque in the amount of MYR10,000 issued by Messrs Vooi & Yee to settle the balance sum owing by the defendant, and if the cheque has lapsed, that Messrs Vooi & Yee immediately issues a new and valid cheque for the same amount;

C

(iii) the balance of the legal fees and disbursements due from the defendant in the amount of MYR62,200, pursuant to both agreements, and goods and services tax ("GST") to be imposed on such amount due;

D

(iv) general damages/exemplary damages in the amount of MYR20,000.

[2] I allowed the plaintiff's claim with regard to the first agreement but dismissed the claim pursuant to the second agreement.

E

[3] The following are my reasons.

The Brief Facts

[4] The plaintiff is a legal firm operating under the name and style of Messrs Albert Ding, Lee & Partners. In April 2017, the defendant, an individual, sought legal advice from the plaintiff regarding her divorce from one Wong Yoon Chong ("the former husband"). A warrant to act dated 11 April 2017 ("the first agreement") (exhibited at p. 15 of Part B of the common bundle of documents ("CBD")), was signed by the defendant. There was no agreement on how much legal fees were payable when the first agreement was signed.

F

G

[5] The divorce was, however, finalised through a *decree nisi* order by way of consent ("the *decree nisi* order"), that was reached on 20 April 2018, whereby the defendant was to receive a total of MYR1.1 million from the former husband, with MYR200,000 to be paid immediately and the balance of MYR900,000 to be paid by instalments over 60 months. The *decree nisi* order, dated 25 April 2018 is exhibited at pp. 1-9 of Part A of the CBD.

H

[6] Pursuant to legal fees for work done up to filing the *decree nisi* order, the plaintiff charged the defendant a total of MYR25,000. This is based on the undated invoice exhibited at pp. 13-14 of Part B of the CBD.

I

[7] The second agreement purportedly entered between the defendant and Albert Ding (the Managing Partner of the plaintiff) during a meeting on 23 April 2018, was documented in a letter dated 26 April 2018 (exhibited at p. 16 of Part B of the CBD) ("the second agreement"), which was for legal fees which the plaintiff was to charge by way of deducting 6% from the monthly instalments of MYR15,000, which were payable by the defendant's former husband, for a period of 60 months commencing May 2018. In return, the plaintiff agreed to ensure that the former husband adheres to the terms of the *decree nisi* order, and to act for the defendant in case of any default or refusal by her former husband to make the necessary payments.

[8] On 8 May 2018, the defendant paid an amount of MYR15,000 to the plaintiff as part of the legal fees and disbursements in respect of the first agreement. Receipt of this payment was duly acknowledged by the plaintiff.

[9] In both May and June 2018, the defendant had made payments of MYR1,800 (MYR900 per month) pursuant to monthly fees in respect of the second agreement. However, subsequently upon the instructions of the defendant, a letter dated 25 June 2018 was issued by Messrs Vooi & Yee informing the plaintiff that they would take over the matter from the plaintiff, and requested for final tax invoice for the legal services provided by the plaintiff in respect of her divorce matter.

[10] The defendant had also informed the plaintiff of her intention to terminate the second agreement. This she had done *via* letter by Messrs Vooi & Yee to the plaintiff, dated 19 July 2018 (exhibited at pp. 27-28 of Part B of the CBD), in which she had enclosed a cheque (exhibited at p. 29 of Part B of the CBD) to the plaintiff in the amount of MYR10,000 as full and final settlement of the matter. The cheque was accepted by the plaintiff but under protest and claim that it was not the full and final settlement of the fees owing to the plaintiff.

[11] On 26 December 2018, plaintiff filed this suit against defendant.

The Plaintiff's Case

[12] In a nutshell, the plaintiff's case is that the defendant is bound by both agreements, since she signed them, and that her termination of the second agreement was not valid, and that she was obliged to pay and settle the agreed legal fees of 6% from the sum of MYR900,000 received by her from the former husband.

[13] The plaintiff's sole witness was Albert Ding Choo Earn ("SP1"), the Managing Partner of the plaintiff firm.

A **The Defendant's Case**

[14] The defendant's case is that the *decree nisi* order was obtained due to the efforts of one Goh Lee Tong, Tony, a family friend of both the defendant and her former husband, and that it was not attributable to the plaintiff. The plaintiff was, therefore, not entitled to the fees claimed pursuant to the first
B agreement.

[15] With regard to the second agreement, the defendant claimed that she was coerced into signing it and that such agreement was not valid as it contained unreasonable terms and that the payment she had to make was for services that were non-existent, which rendered the legal fees unjustifiable.
C

[16] The following were the defendant's witnesses:

(i) Cho Choo Mei ("SD1") – the defendant herself; and

(ii) Goh Lee Tong, Tony ("SD2") – a family friend of the defendant and her former husband.
D

Contentions, Evaluation And Findings

The First Agreement

[17] With regard to the first agreement, the amount of MYR25,000 was for
E the legal fees and disbursements for services that had been provided by the plaintiff to the defendant in respect of the divorce proceedings between the defendant and her former husband, from 11 April 2017 until filing of the *decree nisi* order dated 25 April 2018.

[18] The defendant argued that the terms of the *decree nisi* order were the
F result of the efforts of SD2, a friend of both the defendant and her former husband, and who, the defendant claimed, acted as a quasi-mediator.

[19] In my view, the terms of the *decree nisi* order would have required legal expertise and that could have only been provided by a legal practitioner. SD2 admitted during cross-examination that he was not even
G aware of the *decree nisi* order, since he was not able to read. The following is SD2's evidence:

PC: Encik Tony say selanjutnya rujuk kepada m/s 1 sehingga 9 iaitu daripada bundle yang warna pink colour. Page 1 to 9. Ok Encik Tony boleh baca.
H

SD2: Tak tahu baca.

PC: Tak tahu baca. Inilah salinan perintah menurut kepada persetujuan yang dicapai oleh kedua-dua pihak pada 20/4/2018. Ok kamu setuju ke tidak?

I SD2: Tak faham.

(* PC: Plaintiff's Counsel)

[20] If SD2 could not even understand the *decree nisi* order, it, therefore, could not have been possible for him to have drafted the *decree nisi* order which contained 15 paragraphs of legalese. It is undeniable that drafting those paragraphs would require specific legal knowledge, belonging only to a legal practitioner.

[21] Furthermore, the defendant did not really challenge the first agreement, as she had agreed to the fees of MYR25,000 and even paid MYR15,000 as part payment. Furthermore, she subsequently forwarded a cheque for MYR10,000 to the plaintiff, to settle balance payment of the legal fees owing. The defendant, therefore, has no basis to dispute the first agreement.

[22] SP1 belaboured the court with the mechanism of how and why he imposed GST. In my view, this is not relevant bearing in mind that the total fees stipulated in the invoice was MYR25,000, and nothing more. I, therefore, agree with counsel for the defendant that any additional amount in the form of GST added to the MYR25,000 is an afterthought, as the total fees stipulated in the invoice (exhibited at pp. 13-14 of Part B of the CBD) is MYR25,000, and nothing more.

[23] The first agreement is therefore upheld only to the extent of the amount of MYR25,000.

The Second Agreement

[24] With regard to the second agreement, the plaintiff claimed that a total of MYR54,000 was charged for the legal fees and disbursements of services provided by the plaintiff to the defendant in procuring monthly instalments of MYR15,000 due and payable by the former husband to the defendant commencing May 2018 until the amount of MYR900,000 had been fully paid to the defendant over 60 months, as stated in para. 4 of the *decree nisi* order, which reads:

> 4. bahawa Responden Suami adalah juga dikehendaki membayar kepada Pempetisyen Isteri wang sebanyak MYR900,000 sahaja melalui ansuran bayaran bulanan selama 60 bulan berterusan dengan bayaran sebanyak MYR15,000 sebulan mulai dari bulan Mei 2018 di mana wang tersebut adalah dikehendaki didepositkan ke dalam bank akaun Pempetisyen Isteri pada atau sebelum 10 haribulan setiap bulan di akaun.

[25] The purported legal fees of MYR54,000 was to be paid by the defendant to the plaintiff by way of deducting 6% (equivalent to MYR900 monthly) from the MYR15,000 monthly instalments received by the defendant from her former husband. It is pertinent to note that the money was paid directly to the defendant and not through the plaintiff.

[26] The plaintiff claims that the agreement is valid pursuant to s. 116 of Legal Profession Act 1976 ("LPA") and enforceable pursuant to s. 118 of the LPA. Section 116 reads:

> Section 116 – Advocate and solicitor may enter agreement for costing contentious business
>
> (1) Subject to the provisions of any written law, an advocate and solicitor may make an agreement in writing with his client respecting the amount and manner of payment for the whole or any part of his costs in respect of contentious business done or to be done by such advocate and solicitor, either by a gross sum, or otherwise, and either at the same rate or at a greater or lesser rate than the rate at which he would otherwise be entitled to be remunerated.
>
> (2) Every such agreement shall be signed by the client and shall be subject to this Part.

[27] The relevant parts of s. 118 of the LPA read:

> Section 118 – Enforcement of agreements
>
> (1) No action or suit shall be brought or instituted upon any agreement as is referred to in section 116, but every question respecting the validity or effect of any such agreement may be examined and determined, and the agreement may be enforced, varied or set aside by suit or action by summons, motion or petition by any person or the representatives of any person being a party to such agreement, or being alleged to be liable to pay, or being or claiming to be entitled to be paid the costs, fees, charges or disbursements in respect of which the agreement is made, by the Court in which the business or any part thereof was done, or a Judge of the Court, or, if the business was not done in any Court, then by the High Court or a Judge of the High Court.
>
> (2) Upon any such summons, motion or petition, if it appears to the Court or a Judge that such agreement is in all respects fair and reasonable between the parties, the agreement may be enforced by the Court or a Judge by rule or order, in the manner and subject to the conditions, if any, as to the costs of the summons, motion or petition as the Court or the Judge thinks fair and reasonable.
>
> (3) If the substantive terms of any agreement are deemed by the Court or the Judge to be unfair or unreasonable, the agreement may be declared void, and the Court or Judge may thereupon order the agreement to be given up for cancellation, and may direct the cost, fees, charges and disbursements incurred or chargeable in respect of the matters included therein to be taxed, in the same manner and according to the same rules as if the agreement has not been made:
>
> Provided that the Court or Judge may amend or ratify the agreement where not all the substance of the agreement is unfair or unreasonable.

Whether The Defendant Was Coerced To Enter Into The Second Agreement?

[28] The defendant claimed that she was pressured to sign the second agreement by a lawyer from the plaintiff's firm, one Ms Gunavati, and that Ms Gunavati had threatened not to release the cheque of MYR200,000, being the sum immediately payable under the *decree nisi* order, if the defendant had refused to do so. In re-examination, SD1 explained the situation in detail and testified as follows:

> SD1: Aa Gunavati dia sudah dapat MYR200,000 dia akan telefon saya. Masa itu petang dia telefon saya ini MYR200,000 dia sudah dapat, suruh saya datang collect. Okay, masa tu saya sudah sampai sana collect, dia tak bagi, dia tunjuk saya satu surat, you nak ambil MYR200,000 punya cek, you terpaksa kena sign ini dokumen. Saya cakap ini dokumen tulis apa, dia cakap include itu 6% dengan you sudah dapat itu MYR200,000 tapi saya cakap saya tak setuju ini 6%.

[29] Plaintiff argued that the letter was signed willingly by the defendant and that the defendant understood the contents and had agreed to the 6% monthly charges when she signed the letter. Furthermore, counsel for the plaintiff submitted, that pursuant to s. 103 of the Evidence Act 1950 ("Evidence Act"), it was for the defendant to prove that the second agreement was signed involuntarily, under coercion and pressure. The section reads:

> Section 103 – Burden of proof as to particular fact
>
> The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

[30] In my view, the plaintiff's contention is flawed based on the following reasons. First and foremost, it is important to bear in mind the duties of the plaintiff as a firm of advocates and solicitors. The relationship between a legal practitioner and his/her client imports a duty to be honest in all dealings, and to be diligent in the advice and information given to such client. The plaintiff, being a firm of advocates and solicitors, had a fiduciary duty towards the defendant and as a result thereof, the duty is upon the plaintiff to communicate clearly, and effectively with the defendant. In fact, as common practice and courtesy would dictate, an advocate and solicitor such as those in the plaintiff firm should have briefed the defendant in a proper manner pertaining to any further instructions and the fees attached.

[31] The second agreement was drafted in English and it was clear that the defendant was not proficient at all in the English language. It was the plaintiff's duty to prove that the defendant, being its client, had entered into the second agreement fully apprised of the facts and had signed the second

agreement voluntarily, with full knowledge of the implications of what she had signed, especially since the defendant was not familiar with the intricacies of the law and its mechanism. It was the plaintiff's implied duty to ensure that this had been done, and in failing to do so, the plaintiff had failed in its duty as advocates and solicitors.

[32] Counsel for the plaintiff argued that the issue of the defendant not being proficient in the English language was not pleaded and was therefore an afterthought. I am of the view that the defendant's lack of understanding is not an issue by itself but is linked to the plaintiff's duty to ensure that the defendant had understood the implications of the agreement she had signed, bearing in mind that she was entering into a contract with her own solicitors. It was the plaintiff's pleaded case that the second agreement was valid and enforceable as it was signed voluntarily, and it was, therefore, for the plaintiff, in its fiduciary capacity, to ensure that it had discharged its duty to apprise the defendant, who was its client at the material time, of the relevant facts pertaining to the second agreement.

[33] Counsel for the plaintiff submitted that based on the case of *Lin Wen-Chih & Anor v. Mycom Bhd* [2013] 1 LNS 1231, a person is bound by his contract regardless of his ignorance of the documented language. In my opinion, counsel's reliance on this case is misplaced in view of the fact that, unlike the present case, the relationship of the parties in *Lin Wen-Chih & Anor v. Mycom Bhd* (*supra*) was not that of solicitor-client, and therefore the respondent in that case had no duty to ensure that the appellant had entered into the agreement voluntarily, with full knowledge of the implications of such agreement. Secondly, the principle in *Lin Wen-Chih & Anor v. Mycom Bhd* does not apply if vitiating factors were pleaded to render the contract unenforceable.

[34] Furthermore, by virtue of s. 111 of the Evidence Act, the duty is imposed on the plaintiff to prove that the second agreement was entered into by the defendant voluntarily, and with full knowledge of the implications of what she had signed. The section reads:

> Section 111 – Proof of good faith in transactions where one party is in relation of active confidence
>
> Where there is a question as to the good faith of a transaction between parties, one of whom stands to the other in a position of **active confidence,** the **burden of proving the good faith** of the transaction is on the party who is in a position of active confidence.
>
> ILLUSTRATIONS
>
> (a) The good faith of a sale by a client to an attorney is in question in a suit brought by the client. The burden of proving the good faith of the transaction is on the attorney.

(b) The good faith of a sale by a son just come of age to a father is in question in a suit brought by the son. The burden of proving the good faith of the transaction is on the father. (emphasis added)

[35] Section 111 of the Evidence Act is triggered when one party stands to the other in a position of active confidence. Active confidence has been explained in *Rosli Darus v. Mansor Hj Saad & Anor* [2001] 4 CLJ 226 by Jeffrey Tan J (as he then was) to exist when there is a relationship of trust and confidence between the parties of such nature that it is fair to presume that the wrongdoer abused that relationship in procuring the complainant to enter into the impugned transaction. In such a case, the complainant need not produce evidence that actual undue influence was exerted in relation to the particular transaction.

[36] It follows that once a confidential relationship has been proved between the plaintiff and defendant, the burden then shifts to the plaintiff to prove that the defendant had entered into the impugned transaction freely. See also *Bank of Credit and Commerce International SA v. Aboody* [1990] QB 923; *Barclays Bank plc v. O'Brien* [1994] 1 AC 180 and *Southern Bank Bhd v. Abdul Raof Rakinan & Anor* [2001] 1 CLJ 94.

[37] Once the relationship of trust is established, the law presumes everything against the transaction and the onus is cast upon the person holding the position of confidence or trust to show that the transaction is perfectly fair and reasonable, that no advantage has been taken of his position and that no information which should have been communicated has been withheld.

[38] In this case, there is no doubt that the plaintiff stood in a position of trust and confidence to the defendant, the latter being its client at the material time.

[39] I am also guided by the Court of Appeal in the case of *Saad Marwi v. Chan Hwan Hua & Anor* [2001] 3 CLJ 98 on the application of s. 111 of the Evidence Act to the facts of this case.

[40] In the present case, when the second agreement was executed, the defendant had no separate legal advice. The solicitors who drew up the agreement were appointed by the defendant. Lastly, it is undisputed that the defendant was not proficient in English. She was conversant only in basic Bahasa Malaysia. The second agreement, however, was drafted in English, and there was no certification of any sort in the agreement that it had been explained to the defendant in her mother tongue. Parallels are drawn to the case of *Saad Marwi v. Chan Hwan Hua & Anor* [2001] 3 CLJ 98, where the appellant in that case was in the same circumstances as the defendant in this case.

[41] With regard to the vitiating factors, the defendant gave evidence and explained the circumstances in which it was signed. She said she signed it only because her cheque entitlement of MYR200,000 was being withheld by a lawyer in the plaintiff's firm, until and unless the defendant signed the agreement.

[42] Even if I proceeded on the basis that the legal burden was imposed on the defendant to prove that she signed the second agreement under coercion, in my view, she had discharged it. I believed the witness when she said she was pressured to sign it. My assessment of her was that she was earnest in her explanation and did not strike me as someone whose evidence I had to view with circumspection. Being a lay person, and desperate for the money that she was entitled to, post-divorce, I had no reason to disbelieve her, and in my assessment, her evidence was intact, even after being cross-examined.

[43] The plaintiff further submitted that it was for the defendant to subpoena Ms Gunavati to prove to the court the circumstances in which the second agreement was entered into.

[44] I find this argument flawed, in view of the fact that it is my finding that the defendant had told the truth of what had happened. The only evidence adduced by the plaintiff to contradict the defendant's evidence that she signed it under pressure, was the evidence of SP1 whose evidence did not carry any weight whatsoever, as he was not present at the material time to fully appreciate the circumstances in which the second agreement was signed.

[45] It was, therefore, for the plaintiff to produce as its witness, Ms Gunavati to dispute the defendant's evidence that she signed the second agreement under pressure. This, the plaintiff had not done.

[46] Taking into account all the evidence before me, including the evidence of SD1 and the failure of further explanation by SP1, it is my finding that Ms Gunavati had unlawfully detained the defendant's property (the cheque, in this case), unless she signed the second agreement, which renders the full force of s. 15 of the Contracts Act 1950 ("the Contracts Act"). Section 15 reads:

> Section 15 – Coercion
>
> Coercion is the committing, or threatening to commit any act forbidden by the Penal Code, **or the unlawful detaining or threatening to detain, any property,** to the prejudice of any person whatever, with the intention of causing any person to enter into an agreement. (emphasis added)

Whether s. 114(g) Should Have Been Invoked Against The Plaintiff For Failing To Produce Ms Gunavati

[47] Counsel for the defendant urged the court to draw an adverse inference for the failure of the plaintiff to call Ms Gunavati as a witness. At this juncture, reference is made to s. 114(g) of the Evidence Act, which reads:

> Section 114 – Court may presume existence of certain fact
>
> The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business, in their relation to the facts of the particular case.
>
> ILLUSTRATIONS
>
> The court may presume:
>
> (g) that evidence which could be and is not produced would if produced be unfavourable to the person who withholds it;

[48] In my view, bearing in mind that Ms Gunavati is a legal associate at the plaintiff firm, and that SP1 was not there to witness the encounter between the defendant and Ms Gunavati, the latter would have been the best person to explain the circumstances in which the second agreement was signed. When asked if Ms Gunavati was to be called to give evidence on behalf of the plaintiff, SP1 replied that it was not necessary, without elaborating further.

[49] As stated by the Supreme Court in *Munusamy Vengadasalam v. PP* [1987] 1 CLJ 250; [1987] CLJ (Rep) 221; [1987] 1 MLJ 492, the evidence that is referred to in s. 114(g) of the Evidence Act must not only be relevant, it must be material. In my view, Ms Gunavati would have been the best person to explain the circumstances in which the second agreement was signed.

[50] It is undeniable that the plaintiff had a duty to ensure that the defendant had signed the second agreement voluntarily, with full knowledge of the implications of what she had signed. As a firm of advocates and solicitors, the plaintiff should have treated the defendant with respect, and to have assisted her in the understanding of the second agreement which she signed, and not to pressure her into signing the document by withholding the cheque that she was entitled to. Furthermore, as it is my finding that the evidence of SD1 remained intact even after cross-examination, it was for the plaintiff to produce Ms Gunavati.

[51] A further aspect of s. 114(g) of the Evidence Act is that it must be shown that there was deliberate withholding of the evidence before an adverse inference may be drawn. Deliberate withholding of the evidence may be inferred from the lack of a reasonable explanation for the omission

to produce the witness (see *Adel Muhd El-Dabbah v. AG of Palestine* [1944] AC 156, PC and *Murugan v. Lew Chu Cheong* [1980] 1 LNS 49; [1980] 2 MLJ 139). In this case, SP1's answer as to why the plaintiff had not produced Ms Gunawati was a nonchalant 'it is not necessary'.

[52] In my view, SP1's unsatisfactory answer leads me to infer that Ms Gunavati was deliberately withheld and in such circumstances, an adverse inference is drawn against the plaintiff for failing to call Ms Gunavati to dispute SD1's account of the circumstances in which the second agreement was signed.

Whether The Second Agreement Was A Contingency Fee Arrangement

[53] It behoves me to comment on the nature of the second agreement, in view of the fact that the plaintiff claimed a percentage of what the defendant was entitled to. This is strictly prohibited by s. 112 of the LPA. Section 112 of the LPA reads:

> Section 112 – No advocate and solicitor to purchase interest of client
>
> (1) Except as expressly provided in any written law, or by rules made under this Act, no advocate and solicitor shall:
>
> (a) purchase or agree to purchase either directly or indirectly an interest or any part of the interest which is the subject matter of his client or that of the other party in the same suit, action or other contentious proceeding brought or to be brought or maintained; or
>
> (b) enter into any agreement by which he is retained or employed to prosecute any suit or action or other contentious proceeding which stipulates for or contemplates payment only in the event of success in such suit, action or proceeding.

[54] In my view, the second agreement was in actual fact a contingency fee arrangement. At this juncture, parallels are drawn to the Court of Appeal case of *Titian Desa Sdn Bhd & Anor v. Akberdin Haji Abdul Kader* [2016] 1 LNS 689, where it was stated that a sum of MYR5.48 million (being a sum equivalent to 8% of the supposed settlement sum of MYR68,500,000) that the plaintiff was claiming from the defendant was in fact a contingency fee arrangement which was prohibited by s. 112 of the LPA.

[55] There is no dearth of literature which provides for the justification against such arrangement of payment. By virtue of s. 112 of the LPA, the second agreement is not only against public policy, it is also against the professional ethics of the lawyer. Bearing in mind that the relationship between a lawyer and the client is a highly fiduciary one, it is my view that the plaintiff had misused its position of trust in indulging in a contingency fees contract.

[56] The nature of the second agreement also attracts s. 24 of the Contracts Act 1950, which reads:

> Section 24 – What considerations and objects are lawful, and what not
>
> The consideration or object of an agreement is lawful, unless:
>
> (a) it is forbidden by a law;
>
> (b) it is of such a nature that, if permitted, it would defeat any law;
>
> (c) it is fraudulent;
>
> (d) it involves or implies injury to the person or property of another; or
>
> (e) the court regards it as immoral, or opposed to public policy.
>
> In each of the above cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.

[57] In my view, the second agreement is void by virtue of having violated s. 112 of the LPA.

Whether The Terms Of The Second Agreement Were Unreasonable

[58] Even if the second agreement was lawful, the issue that needs to be addressed is whether it was unreasonable, in view of the legal fees of MYR54,000 which was to be paid by the defendant to the plaintiff by way of deducting 6% of the monthly MYR15,000 instalments (equivalent to a monthly MYR900) received by the defendant from her former husband.

[59] Since the plaintiff was charging the defendant fees on a monthly basis, it was crucial to understand the services that the plaintiff was providing. When cross-examined on these services, SP1 explained that they were in the form of supervising and updating. When quizzed further on the meaning of 'supervise' and 'update', SP1 attempted to clarify but failed to do so, except to say that it entailed making telephone calls.

[60] In my view, the second agreement was unreasonable and unjustified because the services rendered were vague and uncertain. SP1 had failed to explain to the satisfaction of the court what exactly these services entailed, bearing in mind that the monthly instalment of MYR15,000 was paid directly to the defendant by her former husband. In my view, therefore, the services of supervising and updating are redundant and superfluous to say the least, more so, if payment was made promptly by the former husband.

[61] The following were SP1's answers to questions put by the court, in order to understand what these services were that the plaintiff claimed to have been rendering:

JC: What services are you talking about here?

SP1: Yang Arif, the services that we constantly follow up and updating her of the status of the husband payment, so we still following up with her every month basis until 60 month expired Yang Arif. So once she collected the payment then of course based on the agreement she should pay back. Paid to us if she doesn't collect then we were perform.

JC: So are you saying that regardless of payment being made, you would automatically be rendering services?

SP1: Yes. That means update her status if she received it.

JC: So it is not conditional upon payment not being made. Is that what you are saying?

SP1: Not conditional. That means every month we constantly follow up with her how the status payment is it okay, any problem, once she collected she will pay to us.

(*JC: Judicial Commissioner)

[62] The testimony of SP1 itself clearly shows that regardless of whether the defendant received payment promptly, the plaintiff would charge her a monthly MYR900 as legal fees. This is an affront to common sense as the defendant would in fact be paying for nothing.

[63] Secondly, if at all services were provided, it was merely to prompt the former husband if, and only if, he delayed in making payments. Even if that was the case, an amount of MYR900 just to prompt the former husband to make payment, in my view, are exorbitant, excessive and iniquitous.

[64] At this juncture, it is pertinent to note that 'any client would expect fees to be reasonable as the legal profession is duty-bound to abide by ethics. Professional ethics in respect of lawyers is the set of moral principles which lays down certain duties for the observance of its members which they owe to the society, to the court, to the profession, to the public, to his client, befitting professional standards of conduct' as per Hamid Sultan in *SP Veloo & Co v. Affin Bank Bhd* [2017] 1 LNS 1041.

[65] The gist of the plaintiff's case is that the defendant had signed the second agreement and therefore had to pay for whatever fees that was dictated to her, regardless of the fact that the fees the plaintiff charged was for services that were not even rendered, and that even if services were in fact rendered, the fees for such services were exorbitant, in view of the fact that they were probably for a telephone call or a letter made to remind the defendant's former husband of his due monthly instalment.

[66] Counsel for the plaintiff had failed to address the issue of the reasonableness of the services and to explain what the services entailed. There was also a failure by the plaintiff to address its duties as advocates and solicitors towards the defendant, in view of the fact that she was still at that time its client.

[67] Reference is also made to s. 118 of the LPA, which reads:

> Section 118 – Enforcement of agreements
>
> (1) No action or suit shall be brought or instituted upon any agreement as is referred to in section 116, but every question respecting the validity or effect of any such agreement may be examined and determined, and the agreement may be enforced, varied or set aside by suit or action by summons, motion or petition by any person or the representatives of any person being a party to such agreement, or being alleged to be liable to pay, or being or claiming to be entitled to be paid the costs, fees, charges or disbursements in respect of which the agreement is made, by the Court in which the business or any part thereof was done, or a Judge of the Court, or, if the business was not done in any Court, then by the High Court or a Judge of the High Court.
>
> (2) Upon any such summons, motion or petition, if it appears to the Court or a Judge that such agreement is in all respects fair and reasonable between the parties, the agreement may be enforced by the Court or a Judge by rule or order, in the manner and subject to the conditions, if any, as to the costs of the summons, motion or petition as the Court or the Judge thinks fair and reasonable.
>
> (3) **If the substantive terms of any agreement are deemed by the Court or the Judge to be unfair or unreasonable, the agreement may be declared void**, and the Court or Judge may thereupon order the agreement to be given up for cancellation, and may direct the cost, fees, charges and disbursements incurred or chargeable in respect of the matters included therein to be taxed, in the same manner and according to the same rules as if the agreement has not been made:
>
> Provided that the Court or Judge may amend or ratify the agreement where not all the substance of the agreement is unfair or unreasonable.
>
> … (emphasis added.)

[68] Pursuant to s. 118(3) of the LPA, it is my finding that the second agreement is void on the basis of its unfair and unreasonable terms.

Whether Defendant Was Entitled To Terminate The Second Agreement

[69] Since it is my finding that the second agreement was obtained by coercion pursuant to s. 15 of the Contracts Act, s. 19 of the same Act is triggered. Section 19(1) reads:

A Section 19 – Voidability of agreements without free consent

(1) When consent to an agreement is caused by coercion, fraud, or misrepresentation, **the agreement is a contract voidable** at the option of the party whose consent was so caused. (emphasis added)

B **[70]** 'By virtue of s. 19(1) of the Contracts Act, a contract entered into by a party either through innocent or fraudulent misrepresentation is voidable at the option of the party whose consent was so obtained. Thus, the innocent party who had been induced to enter into the contract through an innocent misrepresentation, may choose to set aside the contract on his own accord or by seeking the assistance of the court under the Specific Relief Act 1950' C as per Abdul Malik Ishak JCA in *Balakrishnan Devaraj & Anor v. Admiral Cove Development Sdn Bhd* [2010] 7 CLJ 152.

[71] As a result of the coercion, the defendant is at liberty to set aside the contract on her own accord, and in this case, she had done so.

D **[72]** In addition, it is my finding that the second agreement was in actual fact contingency fees which violated ss. 112 and 118 of the LPA, hence attracting s. 24 of the Contracts Act, rendering it void. A void agreement is one that did not exist to begin with, and therefore the issue of whether the defendant was entitled to terminate it did not even arise.

E **[73]** Counsel for the plaintiff submitted that despite the defendant's allegation, she had never carried out any action under the LPA for the purpose of taxation of the plaintiff's tax invoices until to date, save and except this action taken by the plaintiff in order to recover the outstanding sum which the plaintiff claims is due and payable.

F **[74]** It must be borne in mind that as a result of the coercion exerted, the defendant is at liberty to set aside the contract on its own accord by virtue of s. 19 of the Contracts Act, and in this case, she had done so. There was therefore no obligation on the defendant to apply for taxation of the plaintiff's tax invoices. Furthermore, based on ss. 112 and 118 of the LPA and s. 24 G of the Contracts Act, the second agreement is void. This provides all the more justification for the defendant's omission in applying for the plaintiff's tax invoices to be taxed.

[75] At this juncture, it behoves the court to bring to the attention of counsel for both parties, rr. 16 and 35 of the Legal Profession (Practice and H Etiquette) Rules 1978 ("LPPER"), which, in my opinion, the plaintiff, by its conduct, has run foul.

[76] Rules 16 and 35 of the LPPER are also relevant as they are general provisions that require the plaintiff to uphold interest of their client, and not to abuse confidence reposed in them by the client, which the plaintiff, as I advocates and solicitors should have adhered to. The rules read:

Rule 16 – Advocate and solicitor to uphold interest of client, justice and dignity of profession

An advocate and solicitor shall while acting with all due courtesy to the tribunal before which he is appearing, fearlessly uphold the interest of his client, the interest of justice and dignity of the profession without regard to any unpleasant consequences either to himself or to any other person

Rule 35 – Advocate and solicitor not to abuse confidence reposed in him by client

(a) **An advocate and solicitor shall refrain from any action whereby for his personal benefit or gain he abuses or takes advantage of the confidence reposed in him by the client.**

(b) An advocate and solicitor shall preserve his client's confidence and this duty outlasts his employment. (emphasis added)

Whether The Defendant Was Entitled To Change The Solicitors

[77] Counsel for the plaintiff relied on r. 54(a) of the Legal Profession (Practice and Etiquette) Rules 1978 ("LPPER") which stipulates that 'no other advocate and solicitor shall knowingly agree to appear or to act or continue to appear or to act for such party in such matter or proceeding unless he obtains the consent of the first-named advocate and solicitor.'

[78] Although this may be the case, it must be borne in mind that in the same r. 54, it is also provided in para. (b) that 'no other advocate and solicitor shall knowingly agree to appear or to act or continue to appear or to act for such party in such matter or proceeding unless, he is satisfied that the proper professional remuneration of the first-named advocate and solicitor has been paid or he undertakes that the same will be paid'. It is undisputed that counsel for the defendant had issued a cheque to the plaintiff which the plaintiff had accepted under protest, on the basis that it was not the full and final settlement of the fees.

[79] Rule 54 of the LPPER reads:

Rule 54 – Advocate and solicitor not to appear for a party represented by another advocate and solicitor

Where in any matter or proceeding, the name of any advocate and solicitor or the name of his firm appears on the records for any party, or an advocate and solicitor is known to be acting for a party in a matter whether in a Court or not, **no other advocate and solicitor shall knowingly agree to appear or to act or continue to appear or to act for such party in such matter or proceeding unless:**

(a) **he obtains the consent of the first-named advocate and solicitor; or**

A (b) **he is satisfied that the proper professional remuneration of the first-named advocate and solicitor has been paid or he undertakes that the same will be paid; or**

(c) he has, in ignorance that such name so appears on the record or that such advocate and solicitor has been so acting, already agreed to appear or to act for such party and is unable by reason of circumstances or urgency or the like to refuse to appear or to act further for such party, without exposing himself to a charge of breach of professional duty, or

B

(d) the first-named advocate and solicitor is unwilling or has refused to act further for such party, in which event he shall, if so required, protect any lien which the first-named advocate and solicitor may have for costs.

C (emphasis added)

[80] The plaintiff further claimed that according to O. 64 of the Rules of Court 2012, the defendant may change her solicitor but, unless and until a notice of the change is filed and served, the former solicitor shall, be considered the solicitor of the party until the final conclusion of the cause or matter. Order 64 reads:

D

Order 64 – Change of solicitor by notice

(1) A party to any cause or matter who sues or defends by a solicitor may change his solicitor without an order for that purpose but, *unless and until a notice of the change is filed and served in accordance with this rule, the former solicitor shall, subject to rules 4 and 5, be considered the solicitor of the party* until the final conclusion of the cause or matter.

E

(2) A notice of a change of solicitor in Form 136 shall be filed in the Registry.

F (3) The party giving the notice shall serve on every other party to the cause or matter (not being a party in default as to entry of appearance) and on the former solicitor a copy of the notice.

(4) The party giving the notice may perform the duties prescribed by this rule in person or by his new solicitor.

G (emphasis added)

[81] Although I take note of O. 64 of the Rules of Court 2012, I also look to the case of *Molly Margrete Andrew Gomez v. Tan Suat Ching; Majlis Peguam Malaysia (Intervener)* [2014] 8 CLJ 536. In that case, just like the present case, the respondent had initially appointed the appellant to act for her in a divorce

H proceeding. However, subsequently, the respondent had terminated the services of appellant due to exorbitant fees. Despite the instructions, the appellant persisted to appear on behalf of the respondent. On the application of O. 64 of the Rules of Court 2012, it was stated by Zaleha Yusof J (as she then was):

I

> I have no quarrel that the legal position is as long as there is no notice of change of solicitor is filed, the appellant is still the solicitor on record acting for the respondent. However, here we are looking at the "misconduct" of the appellant as provided for by s. 94 of Act 166. None of the cases cited by the appellant were decided under Act 166.
>
> Section 94(3)(n) and (o) of Act 166 clearly includes "misconduct" of an advocate and solicitor as gross disregard of his client's interests and being guilty of any conduct which is unbefitting of an advocate and solicitor or which brings or is calculated to bring the legal profession into disrepute.
>
> … Hence, it is in my opinion, morally wrong for her to refuse to discharge herself and her act of continuing to appear in court again after receiving the letter was clearly an act without regards of her client's interest and her conduct is a conduct which is unbefitting of an advocate and solicitor, contrary to the said s. 94(3)(n) and (o) of Act 166.

[82] Since reference is made to s. 94 of LPA, it is imperative to scrutinise the provision. The section reads:

> Section 94 – Power of Disciplinary Board to strike off the Roll, suspend for misconduct, etc
>
> (3) For the purposes of this Part, "misconduct" means conduct or omission to act in Malaysia or elsewhere by an advocate and solicitor in a professional capacity or otherwise which amounts to grave impropriety and includes:
>
> ….
>
> (m) the charging, in the absence of a written agreement, in respect of professional services rendered to a client, of fees or costs which are grossly excessive in all the circumstances;
>
> (n) gross disregard of his client's interests; and
>
> (o) being guilty of any conduct which is unbefitting of an advocate and solicitor or which brings or is calculated to bring the legal profession into disrepute.

[83] For the purpose of the present case, I have also highlighted para. (m) which is relevant to the facts of this case. Although the second agreement was in writing, it is my view that it is void, which means there was no agreement to begin with. Hence the application of para. (m) of s. 94 which refers to excessive fees charged in the absence of a written agreement.

[84] In my opinion, the plaintiff in the present case, likewise, was morally wrong to refuse to discharge itself, in view of the fact that its conduct fell within 'misconduct' as stipulated in s. 94 of the LPA.

[85] Counsel for the plaintiff also relied on Chapter 11.06(3) of the Rules and Rulings of the Bar Council where is stated that the new solicitors should obtain the consent of the solicitors on record before filing a notice of change of solicitors.

[86] However it is imperative to note that in the same Ruling, it is stated that such consent shall not be unreasonably withheld.

[87] Chapter 11 (11.06) of the Rules and Rulings of the Bar Council read:

> Chapter 11 – Court Practice
>
> 11.06 – Change of Solicitors
>
> (1) An Advocate and Solicitor on record is deemed, as between himself/herself and the opposing party, to represent his/her client unless he/she has been discharged in accordance with the relevant rules of the court concerned.
>
> (2) As long as an Advocate and Solicitor remains on record, service on him/her is valid service. An Advocate and Solicitor may only be discharged from liability to accept service if he/she has been discharged in accordance with the relevant rules of the court concerned.
>
> (3) **The new Solicitors should obtain the consent of the Solicitors on record before filing a Notice of Change of Solicitors. However, such consent shall not be unreasonably withheld.** This Ruling shall not apply where the solicitor on record cannot be traced or has refused or neglected to respond within reasonable time.
>
> (4) Any Notice of Change of Solicitors must be promptly filed.
>
> (emphasis added)

[88] In this case, it is my finding that consent had been unreasonably withheld. The second agreement was obtained by coercion and this renders it void according to s. 19 of the Contracts Act. Secondly, the fees charged are contingency fees which is prohibited by s. 112 of the LPA rendering it void according to s. 24 of the Contracts Act. Thirdly, based on the unreasonableness of the fees charged, pursuant to s. 118 of the LPA, the second agreement is void.

[89] Furthermore, the rights of the defendant to terminate the plaintiff's services and change her counsel are provided for in s. 120 of the LPA, which reads:

> Section 120 – Where client changes counsel before agreement performed
>
> (1) Notwithstanding the existence of any agreement under section 116, **a client may change his advocate and solicitor** before the conclusion of the business to which the agreement relates and in that case the advocate and **solicitor who is a party to the agreement shall be deemed to have become incapable of acting under the same within the meaning of this section.** **(emphasis added)**

[90] In such circumstances, the defendant had every right to terminate the services of the plaintiff and change solicitors, and the plaintiff's conduct in withholding consent was unreasonable.

[91] The defendant had notified the plaintiff of her intention to terminate its services and to change counsel *vide* a facsimile letter dated 25 June 2018 (exhibited at p. 21 of Part B of the CBD), although the plaintiff claimed to have received it only on 4 July 2018. Since the following instructions, if at all, to the plaintiff would have been on 11 July 2018 (since the former husband was obliged to make payment on/before 10th day of each month), there was no prejudice to the plaintiff as it had ample notice of the termination, bearing in mind that the services it rendered were merely that of 'supervising and updating'.

[92] In any event, SP1 himself claimed that the plaintiff had ceased to provide services to the defendant with effect from 25 June 2018.

Credibility Of Witnesses

[93] 'It is trite law that, apart from applying the standard of proof required by law, a trier of fact, in order to arrive at a decision according to law, must judicially appreciate the evidence led before him upon the issue called for resolution. A decision arrived in the absence of a judicial appreciation of evidence is liable to appellate correction. Judicial appreciation is concerned with the process of evaluating the evidence for the purpose of discovering where the truth lies in a particular case. It includes, but is not limited to, identifying the nature and quality of the evidence, assigning such weight to it as the trier of fact deems appropriate, testing the credibility of oral evidence against contemporaneous documents as well as the probabilities of the case and assessing the demeanour of witnesses' as per Gopal Sri Ram JCA (as he then was) in *Boonsoom Boonyanit v. Adorna Properties Sdn Bhd* [1997] 3 CLJ 17; [1997] 2 MLJ 62.

[94] With regard to the credibility of witnesses, reference is made to s. 146 of the Evidence Act, which reads:

> Section 146 – Questions lawful in cross-examination
>
> When a witness may be cross-examined, he may, in addition to the questions hereinbefore referred to, be asked any questions which tend:
>
> (a) to test his accuracy, veracity or credibility;
>
> (b) to discover who he is and what is his position in life; or
>
> (c) to shake his credit by injuring his character, although the answer to such questions might tend directly or indirectly to criminate him, or might expose or tend directly or indirectly to expose him to a penalty or forfeiture.

[95] Credibility concerns the opportunities for a power of observation of the witness, his accuracy for recollection, and capacity to explain what he remembers (see *Kwang Boon Keong Peter v. PP* [1998] 2 SLR 211).

[96] I find instructive the words of Gillen J in *Sean Thornton v. Northern Ireland Housing Executive* [2010] NIQB 4 which were adopted in *McAllister v. Campbell* [2014] NIQB 24:

> [12] Credibility of a witness embraces not only the concept of his truthfulness ie, whether the evidence of the witness is to be believed but also the objective reliability of the witness ie, his ability to observe or remember facts and events about which the witness is giving evidence.
>
> [13] In assessing credibility the court must pay attention to a number of factors which, *inter alia*, include the following:
>
> – The inherent probability or improbability of representations of fact
>
> – The presence of independent evidence tending to corroborate or undermine any given statement of fact
>
> – The presence of contemporaneous records
>
> – The demeanour of witnesses e.g. does he equivocate in cross examination
>
> – The frailty of the population at large in accurately recollecting and describing events in the distant past.
>
> – Does the witness take refuge in wild speculation or uncorroborated allegations of fabrication
>
> – Does the witness have a motive for misleading the court
>
> – Weigh up one witness against another

[97] Since the plaintiff had produced only one witness, its case depended very much on that particular witness, namely SP1.

[98] It must be borne in mind that in the Privy Council case of *Bombay Cotton Manufacturing Company v. Motilal Shivlal* ILR 1915 39 Bom 386, PC, it was observed by Sir George Farwell, in addressing the credit of a witness upon cross-examination, that 'it is most relevant in a case where everything depends on the judge's belief or disbelief in the witness' story.'

[99] I found SP1 to be defensive and evasive. He was evasive to several questions, especially those relating to the nature of the services that he provided pursuant to the second agreement, prompting the court several times to instruct him to answer the questions accordingly.

[100] He also displayed hostile behaviour towards counsel for the defendant, and as an advocate and solicitor himself, I expected a higher standard of decorum from him.

[101] Although the demeanour of the witness is only one aspect when considering the totality of the evidence, it is imperative for witnesses to observe decorum and civility in a court of law.

[102] On the other hand, I found the SD1 to be forthright and honest. Although she had to have many questions repeated so that she could understand them, in my view she answered them truthfully. Discrepancies in her evidence, if at all, were minor, and on the whole, she was convincing in her evidence.

Conclusion

[103] Based on the aforesaid reasons, and after careful consideration of both oral and documentary evidence, as well as submissions of counsel for both parties, I allowed the plaintiff's claim only with regard to the enforceability of the first agreement; and ordered that the defendant reissue the cheque to the plaintiff for the balance sum of MYR10,000. With regards to the second agreement, the plaintiff's claim was dismissed with costs to the defendant in the sum of MYR8,000 (subject to allocatur fees).